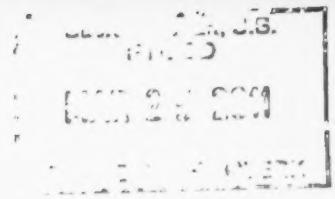

No. 10-941

IN THE
SUPREME COURT OF THE UNITED STATES

DERRICK O'NEAL MASON,
Petitioner,

v.

KIM T. THOMAS, INTERIM COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION

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CAPITAL CASE

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court review Mason's claim that the Eleventh Circuit erred when it found the confrontation clause violation was harmless?

2. Should this Court review Mason's claim that the Eleventh Circuit erred when it determined that his arrest claim was precluded from review under *Stone v. Powell*?

3. Should this Court review Mason's claim that his custodial statements were obtained in violation of *Miranda v. Arizona* where this claim is procedurally defaulted?

4. Did the Eleventh Circuit err when it denied Mason a certificate of appealability on some of the claims in his habeas petition?

5. Did Mason allege in the Eleventh Circuit that the district court erred in its determination concerning procedurally defaulted claims, and did the district court properly determine that these claims are procedurally defaulted?

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On March 27, 1994, Derrick O'Neal Mason murdered Angela Cagle during an attempted robbery of a Majik Market in Huntsville, Alabama. Mason was convicted and sentenced to death for this murder. On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998), *aff'd*, 768 So. 2d 1008 (Ala. 2000). This Court denied Mason's petition for writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

Mason subsequently filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. On July 7, 2005, the post-conviction court denied the Rule 32 petition.[1] That decision is not published. Mason did not timely file his notice of appeal, and on September 8, 2005, the Alabama Court of Criminal Appeals dismissed Mason's appeal, in an unpublished order, because it was untimely filed. The Alabama Supreme Court denied certiorari review in an unpublished order on August 18, 2006.

Mason then filed a petition for writ of habeas corpus in the United States District Court for the Northern District of Alabama. On March 3, 2009, Judge Virginia Emerson Hopkins entered an unpublished memorandum opinion and final

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[1] The Rule 32 petition was originally denied on August 6, 2004, but due to a clerical error, the parties were not informed of the dismissal until April 25, 2005. The Alabama Court of Criminal Appeals granted Mason an out-of-time appeal. The facts surrounding this action are set forth in more detail in the statement of the case.

judgment denying the habeas petition. Pet. App. 119a-254a. The Eleventh Circuit affirmed on May 11, 2010. *Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010).

STATEMENT OF THE CASE

A. The Proceedings Below

In 1994, Mason was indicted by a grand jury for the capital murder of Angela Cagle during an attempted robbery in violation of Ala. Code, §13A-5-40(a)(2). The jury found Mason guilty. Following a sentencing hearing, the jury recommended that Mason be sentenced to death by a 10-to-2 vote. The trial court accepted the jury's recommendation and sentenced Mason to death.

On direct appeal, the Alabama Court of Criminal Appeals and the Alabama Supreme Court affirmed Mason's conviction and death sentence. *Mason v. State*, 768 So. 2d 981 (Ala. Crim. App. 1998), *aff'd*, 768 So. 2d 1008 (Ala. 2000). This Court denied Mason's petition for writ of certiorari. *Mason v. Alabama*, 531 U.S. 994 (2000).

On October 17, 2001, Mason filed a petition for post-conviction relief under Rule 32 of the Alabama Rules of Criminal Procedure. The State filed its answer to the Rule 32 petition in January of 2002. On August 6, 2004, the trial court denied the Rule 32 petition. However, due to a clerical error, the parties were not informed of the dismissal until April 25, 2005. Mason then filed a petition for writ of mandamus in the Alabama Court of Criminal Appeals requesting permission to file an out-of-time

appeal. The State stipulated to the facts in the petition for writ of mandamus. On June 29, 2005, the Alabama Court of Criminal Appeals granted the writ, directed the trial judge to set aside its order dismissing the Rule 32 petition and to reissue its order denying the petition, and notify Mason so that a timely notice of appeal could be filed.

The trial court again denied the Rule 32 petition on July 7, 2005. Under Alabama law, Mason was required to file a notice of appeal from the denial of the Rule 32 petition on or before August 18, 2005. However, Mason did not file his notice of appeal until August 22, 2005. On September 8, 2005, the Alabama Court of Criminal Appeals dismissed Mason's appeal because it was untimely filed. Pet. App. 112a. The Alabama Supreme Court denied certiorari review on August 18, 2006. Pet. App. 113a.

Mason filed a petition for writ of habeas corpus in the Northern District of Alabama. Mason filed an amendment to the habeas petition on January 16, 2007. The State of Alabama filed its answer to the amended petition on March 27, 2007. On March 3, 2009, Judge Virginia Emerson Hopkins entered a memorandum opinion and final judgment denying the habeas petition. Pet. App. 119a-254a. Mason filed a motion to alter or amend the judgment on March 17, 2009. This motion was denied on March 25, 2009.

Mason filed a notice of appeal and a motion for a certificate of appealability on April 24, 2009. On May 14, 2009, Judge Hopkins denied Mason's certificate of appealability. Mason then filed a certificate of appealability with the Eleventh Circuit

Court of Appeals. On July 10, 2009, the Eleventh Circuit granted Mason's motion for a certificate of appealability on four issues. On May 11, 2010, the Eleventh Circuit affirmed the district court's denial of habeas relief. *Mason v. Allen*, 605 F.3d 1114 (11th Cir. 2010).

B. Statement of the Facts

During the early morning hours of March 27, 1994, 25-year-old Angela Cagle was murdered while working in a Majik Mart convenience store in Huntsville, Alabama. *Mason v. State*, 768 So. 2d 981, 983 (Ala. Crim. App. 1998). Around 3:30 a.m. on March 27, 1994, DeAnna Lechman walked into the Majik Mart to buy cigarettes for her mother. No one was visibly present in the store so Lechman began calling out to get the clerk's attention. When no one answered, she walked to the back of the store where she spotted the partially nude body of Angela Cagle. Lechman went to the counter and telephoned for help. *Id.*

The first officer to arrive at the scene found Cagle's body lying across a desk in the storeroom. She was wearing only her socks and appeared to have a gunshot wound to the right side of her face. The coroner found a second gunshot wound on the victim's left cheek when he moved her body. *Id.*, at 984.

Investigator Harry Renfroe of the Huntsville Police Department, testified that during the investigation of the death of Angela Cagle a young man approached Officer Dewey Miller and asked what type of weapon was used in the murder. Officer Miller could not answer this question and told him that he needed to talk to an investigator.

The young man gave Officer Miller a number where he could be reached. Investigator Renfroe testified that he later talked with and met this individual who gave him the following information: (1) that he had information about a .380 caliber pistol used in the murder; (2) that the murder weapon was a Davis brand gun; (3) that the murderer's name was Derrick Mason; and (4) that Mason was "out of control ... trying to make a name for himself and that he was involved in this homicide." (R. 1153-1157)

This same individual subsequently told Investigator Renfroe that Mason would most likely be at a certain apartment complex later that evening. A be-on-the-lookout was issued for Mason. That night, two officers spotted Mason's vehicle and stopped it while it was in the drive-through lane of a fast food restaurant. Mason cooperated with the officers when they told him to get out of the vehicle and placed him under arrest. During an inventory search of the vehicle, a Davis .380 pistol was found in Mason's vehicle. Later that night, this pistol was identified as the murder weapon. *Mason*, 768 So. 2d at 985.

After Mason was arrested and brought to the police station, Investigator Renfroe informed him of his *Miranda* rights by reading them from a printed card. (R. 1167) Mason acknowledged that he understood his rights. There were no promises or threats made to Mason. (R. 1168) When Mason was asked about the weapon that was found in his vehicle, he stated that he had a Davis .380 in his truck that he had borrowed from an acquaintance. (R. 1190) Mason told Investigator Renfroe that the gun had been in his possession since he had borrowed it and that he had fired it twice. (R. 1171-

1172) Mason initially denied any involvement in the victim's murder. (R. 1174-1175) Later during the interview, Investigator Renfroe learned that the gun found in Mason's truck was the murder weapon. When confronted with this fact, Mason continued to deny any involvement in the murder. (R. 1176)

Mason subsequently asked everyone in the room but Investigator Bud Parker of the Huntsville Police Department to leave. The other investigators complied and Investigator Parker read Mason his *Miranda* rights a third time. Mason then gave a detailed statement to Investigator Parker, admitting that he murdered Angela Cagle.[2]

REASONS FOR DENYING THE PETITION

The claims in Mason's petition for writ of certiorari are subject to the Antiterrorism and Effective Death Penalty Act ("AEDPA"), 28 U.S.C. §2241, *et. seq.* Mason has failed to show that the state court's opinion on these claims is "contrary to or an unreasonable application of" this Court's "clearly established" precedent. 28 U.S.C. §2254 (d)(1). This Court should deny the certiorari petition for this reason alone.

Mason has not raised any certworthy issue. The split he asserts are illusory, and he is seeking no more than factbound error correction of the sound decision of an intermediate state appellate court. Such review is not the proper domain of this Court.

[2] Mason's confession is set out in its entirety in the opinion of the Alabama Court of Criminal Appeals. *Mason v. State*, 768 So. 2d 981, 985-987.

SUP. CT. R. 10. There is no split here, and no other reason why this Court should grant certiorari.

I. This Court Should Decline To Review Mason's Claim That The Eleventh Circuit Erred When It Found The Confrontation Clause Violation In His Case Was Harmless.

Mason contends that the Eleventh Circuit erred when it found that the confrontation clause violation in his case was harmless error. Mason asserts that this holding is contrary to holdings of the Fifth and Second Circuits. Certiorari should be denied on this claim for at least five reasons.

A. This Claim Is Procedurally Defaulted Because It Was Not Fairly Raised In The State Courts.

First, this claim is procedurally defaulted because it was not fairly presented to the Alabama courts. Before trial, Mason filed numerous motions for the State to reveal the identity of any confidential informants. The trial court denied these motions. At trial, Investigator Harry Renfroe of the Huntsville Police Department testified that during the investigation of the victim's death a young man approached Officer Dewey Miller and began asking him questions about the murder. Officer Miller told the young man that he could not give him any information. Investigator Renfroe later talked with and met this individual who gave him the following information: (1) that he had information about a .380 caliber pistol used in the murder; (2) that the murder weapon was a Davis brand gun; (3) that the murderer's name was Derrick Mason; and (4) that Mason was "out of control ... trying to make a name for himself and that he was involved in this

homicide." (R. 1153-1157) There was no objection to this testimony at trial from Mason's attorneys. After this testimony, the trial court charged the jury that it could not consider these statements for the truth of the matter asserted but only to show the sequence of events. (R. 1183-1184)

Issue V of Mason's brief to the Alabama Court of Criminal Appeals was captioned: "Did The Trial Court Err In Denying The Appellant's Request To Reveal The Identity Of An Alleged Confidential Informant?" Mason then argued in Issue V of this brief that the trial court erred when it denied his attempts to discover the identity of the confidential informant even though he filed a motion for expanded discovery under *Ex parte Monk*, 557 So. 2d 832 (Ala. 1989). Mason also argued that this individual was not a confidential informant in the legal sense because Detective Renfroe "had no previous dealings with [him], and no track record of reliability." Mason stated the following in the last sentence of this argument: "The informant's testimony was clearly hearsay and Mason was deprived of his Sixth Amendment right to confront the witness who accused him of this crime."[3] The Alabama appellate courts did not address nor mention Mason's one-sentence claim that he was deprived of his Sixth Amendment right to confront the witness who accused him of this crime in their direct appeal opinions. *Mason v. State*, 768 So. 2d 981, 1001-1002 (Ala. Crim. App. 1998), *aff'd*, *Ex parte Mason*, 768 So. 2d 1008, 1010-1012 (Ala. 2000).

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[3] Mason made the exact same argument in the Alabama Supreme Court.

Mason did not present this claim face-up and squarely to the state courts. *Picard v. Connor*, 404 U.S. 270, 275 (1971)(federal claim must be fairly presented to the state courts). Because this claim is defaulted, this Court should decline to grant Mason's certiorari petition.

B. Mason's Argument That The Eleventh Circuit's Holding Is Contrary To Holdings Of Other Circuits Was Not Raised In The Lower Court.

Second, Mason did not argue in his rehearing brief to the Eleventh Circuit that its holding that the confrontation clause violation was harmless is contrary to the holdings of the Fifth and Second Circuits. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

C. The Underlying Issue Is Not Worthy Of This Court's Review.

Certiorari is not a matter of right, but of judicial discretion, and will be granted only where there are special and important reasons. *See Faye v. Noia*, 372 U.S. 391, 436 (1963); Rule 10, Rules of the Supreme Court of the United States. In addition, the demands on this Court's time mandate that it select for review only those truly important cases that will have a wide ranging impact. Mason has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established

precedent to the facts of this case. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

D. There Is No Split.

Fourth, there is no real split on this issue. Mason asserts that the Eleventh Circuit's holding that the confrontation clause violation in this case is harmless is contrary to holdings of the Fifth and Second Circuits. This Court should not grant certiorari on this claim because the holding of the Eleventh Circuit is not contrary to the holdings of the Fifth and Second Circuits. All of these circuits applied the harmless error analysis set forth by this Court in *Brecht v. Abrahamson*, 507 U.S. 619 (1993). While the Eleventh Circuit found that the confrontation clause error in Mason's case was harmless, the Fifth and Second Circuits found that the confrontation clause errors in those cases was not harmless. *See Fratta v. Quarterman*, 536 F.3d 485 (5th Cir. 2008); *United States v. Gomez*, 617 F.3d 88 (2nd Cir. 2010).

The differences between those results are not due to any split on the proper legal rule here, but rather due to differences in the facts to which those rules were applied in those cases. The facts in *Fratta* and *Gomez* are distinguishable from the facts in the instant case. In *Fratta*, a sheriff's deputy testified to the substance of custodial confessions given to law enforcement officials by the two men who murdered the victim. In addition, a girlfriend of one of the men testified concerning statements he made to her about the murder. *Fratta*, 536 F.3d at 488-490. In *Gomez*, a detective testified about recorded

conversations between Gomez and his co-conspirator. *Gomez*, 617 F.3d at 89-90. In addition, in *Fratta* and *Gomez*, the evidence against the defendants was not overwhelming. In the instant case, as set forth below, the evidence of Mason's guilt was overwhelming.

The holding of the Eleventh Circuit in this case is not contrary to the holdings of the Fifth and Second Circuits. This case does not present, at this time, sufficient and special important reasons to grant certiorari review. *Faye v. Noia*, 372 U.S. 391, 436 (1963); SUP. CT. RULE 10.

E. Mason's Claim Has No Merit.

Fifth, there is no compelling reason to grant cert here because Mason's claim fails on the merits. The Eleventh Circuit properly determined that the admission of the evidence in this case was harmless. The evidence against Mason was overwhelming – including the fact that the murder weapon was found in his possession when he was arrested and that Mason gave a detailed confession to this crime. As the Eleventh Circuit found: "When viewed in light of the overall strength of the prosecution's case and the presence of corroborating evidence, we cannot say that there was 'more than a reasonable probability that the [Confrontation Clause] error contributed to the [conviction]' *Horsley*, 45 F.3d at 1493." *Mason*, 605 F.3d at 1124. The Eleventh Circuit also correctly concluded that the error was also harmless during the penalty phase. The Eleventh Circuit stated the following concerning the penalty phase claim:

> Even without the improper testimony and argument, there was sufficient evidence to

> support the heinous, atrocious, and cruel aggravating factor. Mason himself presented testimony that he lacked the ability to control his behavior. Mason's family also testified that at times they could not control Mason, and that they put him on various medications to help him control himself and, even then, he would still have problems. Based on this testimony, his counsel was able to argue to the jury that three statutory mitigating circumstances were present, including that Mason had substantially-impaired capacity to appreciate the criminality of his conduct or to conform his conduct to the law. The informant's statement that Mason was "out of control" is hardly prejudicial if the defense also argued that Mason could not control his behavior as a mitigating circumstance. Under all of the circumstances presented in this record, we conclude that Mason has failed to show "more than a reasonable possibility that the error contributed to the sentence." *Horsley,* 45 F.3d.

Mason, 605 F.3d at 1124.

Mason argues that the Eleventh Circuit erred when it gave significant weight to his confession because the confession's reliability has also been called into question. However, as set forth below, most of Mason's claim concerning the voluntariness of his statement is procedurally defaulted. The remainder of the claim – the portion presented to the Alabama courts – is without merit. Mason, therefore, is not entitled to relief on this argument.

II. This Court Should Decline To Review Mason's Claim That The Eleventh Circuit Erred When It Determined That His Arrest Claim Was Precluded From Review Under *Stone v. Powell*.

Nor should this Court grant review on Mason's claim that the Eleventh Circuit erred when it held that his pretextual arrest claim was precluded from review under *Stone v. Powell*, 428 U.S. 465 (1976). Mason asserts that this claim is not barred by *Stone* because the state courts did not analyze or consider the evidence of pretext that he introduced at his suppression hearing. For the reasons set forth below, certiorari should be denied on this claim.

A. Certiorari Should Be Denied Because The Underlying Issue Is Not Worthy Of This Court's Review.

First, Mason raises no question of wide-ranging significance. Mason has not alleged compelling grounds for this Court to grant certiorari review of this claim. Moreover, the instant claim involves a simple application of established precedent to the facts of this case. In addition, Mason does not allege that there is a split in the circuits concerning the Eleventh Circuit's treatment of this claim. For that reason, a decision in this case would be of such narrow scope and limited precedential value that it is not worthy of certiorari consideration.

B. Mason Is Not Entitled To Relief On This Claim.

Mason's argument that his Fourth Amendment claim is not barred by *Stone v. Powell* because the trial court made no factual findings concerning this

claim and because the appellate court's review was cursory is without merit. In *Stone*, this Court held that

> where the state has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

428 U.S. at 494; *see also Cardwell v. Taylor,* 461 U.S. 571(1983) (summarily reversing, on the basis of *Stone*, a lower court's consideration of a Fourth Amendment claim on habeas). The Eleventh Circuit has clarified *Stone's* "full and fair consideration" requirement in two important respects, both of which bear directly on this case. First, the Eleventh Circuit (or, more accurately, its predecessor) has emphasized that "an 'opportunity for full and fair litigation' [under *Stone*] means just that: an opportunity." *Caver v. Alabama*, 577 F.2d 1188, 1192 (5th Cir. 1978). Accordingly, "[i]f a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Id.*; *accord Huynh v. King*, 95 F.3d 1052, 1058 (same). Second, the Eleventh Circuit has held that full and fair consideration "includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an appellate court when the facts are not in dispute." *Bradley v. Nagle*, 212 F.3d 559, 565 (11th Cir. 2000). Contrary to Mason's argument, this case law of the Eleventh Circuit is not contrary to the case law of

the Fifth and Tenth Circuits and, in fact, is entirely consistent with the holdings of those circuits. *See Matthews. Workman*, 577 F.3d 1175, 1194 (10th Cir. 2009); *Hughes v. Dretke*, 412 F.3d 582, 596 (5th Cir. 2005).

In this case, Mason was given a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. A hearing was held on Mason's motions to suppress and he was allowed to present evidence in support of these motions. After hearing the testimony presented in the suppression hearing, the trial court denied Mason's motions to suppress. The Alabama Court of Criminal Appeals then gave full consideration to Mason's Fourth Amendment claim, holding as follows:

> In this case, the police arrested the appellant pursuant to an outstanding warrant for third-degree assault. The appellant does not challenge the validity of the arrest warrant. The evidence established that the appellant was advised of his rights three separate times, and that each time he knowingly and voluntarily waived his rights and spoke with the police. There was no evidence that the appellant was under the influence of drugs, or that his confession was coerced by inducements or threats. "As long as the police officer is doing only what is objectively authorized and legally permitted, the officer's subjective intent in doing it is irrelevant." *Ex parte Scarbrough,* 621 So.2d 1006, 1010 (Ala.1993). In this case, the officers' arrest and questioning of the appellant were objectively reasonable; accordingly, we find no plain error

> in the trial court's denial of the motion to suppress the appellant's custodial statement.

Mason v. State, 768 So. 2d 981, 997-1000, 1001 (Ala. Crim. App. 1998).

Mason was given a full and fair opportunity to litigate his Fourth Amendment claim in the state courts. The Eleventh Circuit correctly found that *Stone* prohibits federal review of this claim. *Mason v. Allen*, 605 F.3d at 1120-1121. This Court should, therefore, deny certiorari review of this claim.

III. Certiorari Should Be Denied On Mason's Claim That His Custodial Statements Were Obtained In Violation Of *Miranda v. Arizona*, 384 U.S. 436 (1966), Because The Claim Is Procedurally Defaulted.

The Eleventh Circuit and the district court properly refused to consider Mason's claim that his statements were involuntary because this claim is procedurally defaulted. Mason did not allege on direct appeal that he was subjected to improper questioning by law enforcement, that he was intoxicated or hungry, that he was psychologically coerced, or that he was misled by law enforcement. Mason's entire argument to the Alabama Court of Criminal Appeals and the Alabama Supreme Court read:

> As mentioned in the preceding argument, Mason was placed under arrest for assault in the third degree. He was placed under arrest during the evening of March 29, 1994. Mason was transported to the Huntsville Police Department, and there he was interrogated for several hours by detectives. Mason's

> contention is that his arrest on the third-degree assault was merely a pretext for the police to interview him about the homicide of Ms. Cagle. Mason confessed to the third-degree assault, and as such any further questioning of Mason regarding other alleged incidents was in violation of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). The continued questioning of Mason after his alleged statement regarding the misdemeanor assault was in violation of his rights under *Miranda*, and as such, the alleged custodial statement should have been suppressed by the trial court.

The allegations Mason attempted to raise in federal court were presented for the first time in his post-conviction petition. The post-conviction court found in its order denying relief that those allegations were procedurally barred because they could have been but were not raised on direct appeal. Mason's failure to make these allegations on direct appeal was a procedural default under state law, which bars federal habeas corpus review of this claim. *See e.g., Caniff v. Moore*, 269 F.3d 1245, 1246-1247 (11th Cir. 2001); *Baldwin v. Johnson*, 152 F.3d 1304, 1310, 1318-1320 (11th Cir. 1998); *King v. Strickland*, 714 F.2d 1481, 1491-1492 (11th Cir. 1983) ("The failure to bring up an issue on appeal, no less than at trial, may preclude federal habeas corpus review.").

There are only two exceptions to the procedural default rule. First, a petitioner may obtain federal review of a procedurally defaulted claim if he can show both cause for the default and actual prejudice resulting from the default. *Wainwright v. Sykes*, 433

U.S. 72 (1977); *Smith v. Newsome*, 876 F.2d 1461, 1465 (11th Cir. 1989). The second exception is that, in extraordinary cases, a federal court may grant a habeas petition without a showing of cause or prejudice to correct a fundamental miscarriage of justice. *Engle v. Issac*, 456 U.S. 107 (1982); *Murray v. Carrier,* 477 U.S. 478 (1986). Mason has not attempted to prove that he meets either of these exceptions.

Mason does argue that his claim is not procedurally defaulted because this Court's precedent requires only that he fairly present his claim in one full round of the state's established appellate review process. This argument fails, however, because Mason did not fairly present his claim in that matter. Mason never argued on direct appeal that he was subjected to improper questioning by law enforcement, that he was intoxicated or hungry, that he was psychologically coerced, or that he was misled by law enforcement.

Mason also argues that this claim is not procedurally defaulted because the Alabama courts conducted plain error review of the record in his case. While Alabama has a plain error rule in death penalty cases that permits review of some matters even absent an objection at trial, Rule 39(k) and Rule 45A, Ala.R.App.P., this claim was not reviewed pursuant to either of those rules on direct appeal and is not within the scope of those rules. *Mason v. State*, 768 So. 2d 981, 1001 (Ala. Crim. App. 1998), *aff'd,* 768 So. 2d 1008 (Ala. 2000). A plain error rule which is applicable on direct appeal does not permit collateral review of a claim not addressed on direct appeal. *See United States v. Frady*, 456 U.S. 152, 163-165 (1982). The Eleventh Circuit examined

whether Alabama's plain error rule excuses procedural defaults in state court or removes the bar to federal court review of defaulted claims and stated the following:

> Since *Magwood* was silent about the non-effect of Alabama's plain error rule on procedural default issues, we will be explicit: the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. Unless there is some indication that the state court was aware of this issue, we cannot say that the court rejected the merits of petitioner's constitutional claim. A contrary rule would encourage the "sandbagging" of state courts criticized in *Wainwright v. Sykes,* 433 U.S.. *See Murray v. Carrier,* 477 U.S. (possibility of "sandbagging" exists on appeal "since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful."). Accordingly, we reject Julius' argument. (footnote omitted)

Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir.), *modified on unrelated grounds*, 854 F.2d 400 (11th Cir.), *cert. denied*, 488 U.S. 960 (1988). There is nothing in the opinion of the Alabama courts which

indicates that those courts reviewed Mason's claim. This Court should therefore reject Mason's argument that the claim is not procedurally defaulted because there was a plain error review conducted in this case.

This Court should not grant certiorari review of Mason's claim that his statements were involuntary because the claim is procedurally defaulted. Mason has done nothing to show that his claims are not procedurally defaulted. In addition, Mason has not shown that there is a split in the circuits concerning whether the claim is procedurally defaulted.

IV. Certiorari Should Be Denied On Mason's Claim That The Eleventh Circuit Erred When It Denied A Certificate Of Appealability On Several Of The Claims In His Habeas Petition.

Mason contends that the Eleventh Circuit erred when it denied his request for a certificate of appealability on the following: his claim that the State used its peremptory challenges to eliminate potential jurors on the basis of their race and gender; his claim that he was entitled to relief on his prosecutorial misconduct claim; his claim that he was entitled to relief on claims concerning the heinous, atrocious, and cruel aggravating circumstance; his claim that he was denied the effective assistance of counsel at his trial and sentencing; and, his claim that the district court erred when it denied him an evidentiary hearing. Mason asserts that reasonable jurists would find the district court's assessment of his claims debatable or wrong or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further. As explained below, certiorari

should not be granted on this claim because there is no split on these issues, and the claims Mason contends should be reviewed are either procedurally defaulted or without merit.

A. Mason's Claim That The State Exercised Its Peremptory Challenges To Eliminate Potential Jurors On The Basis Of Their Race Or Gender Is Procedurally Defaulted.

Mason's claim that the State used its peremptory challenges to eliminate potential jurors on the basis of their race and gender is procedurally defaulted because it was not raised at trial or on direct appeal. Mason attempted to raise this claim in his state post-conviction petition, and that court found the claim to be procedurally defaulted for the reasons set forth above. Mason then failed to timely appeal the denial of his state post-conviction petition to the Alabama Court of Criminal Appeals – another reason this claim is defaulted.

When the district court refused to consider this claim it properly found that Mason does not dispute that he failed to timely appeal the denial of his state post-conviction petition and does not deny that he never presented his claim that the State exercised its peremptory challenges in a discriminatory manner against women. Pet. App. 233a. The district court also properly rejected Mason's claim that he presented his *Batson* claim on direct appeal because he presented the overruled *Batson* objections to the Alabama Court of Criminal Appeals and the Alabama Supreme Court. The district court stated the following concerning this argument:

> Nowhere in any brief or materials presented on direct appeal did Mason raise a *Batson* claim. He simply attached a document entitled "List of Adverse Trial Court Rulings to the Briefs", seven of which read: "Overruled *Batson* challenge" and a page citation to the trial record. Additionally, Mason at no point complained that he was raising such a claim and the state court had overlooked the effort. Contrary to the misleading assertion made here, Mason did not present a *Batson* claim to the state court during the direct appeal process. (footnote omitted)

Pet. App. 233a-234a.

Mason's claim that the Eleventh Circuit erred when it denied a certificate of appealability on this claim is without merit because the claim is procedurally defaulted.

B. Mason's Argument That He Is Entitled To Relief On His Prosecutorial Misconduct Claim Is Without Merit.

Mason asserts that reasonable jurists could find the district court's assessment of his prosecutorial misconduct claim debatable or wrong. Mason argues that the prosecutor improperly vouched for the credibility of the State's witnesses, made improper and incorrect statements of law and fact, mischaracterized testimony to the jury, and introduced racial bias and sexual assault to inflame the jury to vote for the death penalty.

Most[4] of the prosecutorial misconduct claims Mason is raising were addressed by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. When a habeas petitioner's claim has been adjudicated on the merits in state court proceedings, 28 U.S.C. §2254 (d) forecloses relief unless either subsections 2254(d)(1) or (d)(2) are applicable. *Early v. Packer*, 537 U.S. 3, 7 (2002). The burden of showing that an issue falls within subsections 2254(d)(1) or (d)(2) is on the petitioner. *See Woodford v. Visciotti*, 537 U.S. 19, 25 (2002). Mason did not allege in the district court, in his certificate of appealability to the Eleventh Circuit, and, has not alleged in his certiorari petition that the State court's determination of this issue "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1)-(2). Certiorari should be denied for this reason alone.

In addition, the district court examined Mason's prosecutorial misconduct claims that were raised in the Alabama Court of Criminal Appeals and the Alabama Supreme Court and found that the state appellate courts properly denied relief on the claims.

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[4] Most of Mason's prosecutorial misconduct claim was raised in the state courts. However, some of the claims were not raised in state court and are procedurally defaulted. (State's Answer, pp. 30-47) Mason has not really delineated the claims he is raising in his certiorari petition. To the extent that Mason is attempting to allege any prosecutorial misconduct claims that are defaulted, the State does not waive its default arguments.

Pet. App. 197a-232a. While Mason disagrees with this finding, he has not attempted to prove that the district court was wrong when it found that the state court's treatment of his claims is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. §2254(d)(1)-(2). Certiorari should, therefore, be denied on this claim.

C. Mason Is Not Entitled To Relief On His Claim That The Trial Court's Findings And Jury Instructions Concerning Aggravators And Mitigators At Sentencing Were Erroneous.

Mason argues that the trial court's findings and instructions concerning aggravating and mitigating circumstances at sentencing were erroneous. Specifically, Mason argues that the trial court erred when it found that the heinous, atrocious, and cruel aggravating circumstance existed in his case, when it incorrectly required the jury to find mitigating circumstances unanimously while permitting aggravating circumstances to be found by a less than unanimous vote, and when it instructed the jury that it had to find aggravating circumstances beyond a reasonable doubt. Certiorari should not be granted on any of these arguments.

First, Mason has not alleged in his certiorari petition that the Alabama Court of Criminal Appeals treatment of the claim concerning whether the heinous, atrocious, or cruel aggravating

circumstance existed is contrary to, or involved an unreasonable application of, this Court's precedent. 28 U.S.C. §2254(d)(1)-(2). In addition, the district court properly found that Alabama courts have consistently interpreted Alabama's heinous, atrocious, or cruel aggravating circumstance to include psychological torture as well as physical suffering and that the victim in this case was "clearly subjected to psychological torture and there was more than enough evidence for the jury to infer that she physically suffered after Mason shot her the first time." Pet. App. 196a-197a. Mason's argument to the contrary is without merit.

Second, Mason's claim that the trial court's jury instructions concerning the aggravating and mitigating circumstances were incorrect is procedurally defaulted from review because he did not not raise it on direct appeal. The district court found that this claim was precluded from review for this reason. Pet. App. 169a. Mason argues that this determination was incorrect because he raised it in the context of his ineffective assistance of counsel claim. This argument was never presented to the Eleventh Circuit and should, therefore, not be considered by this Court. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992)(holding that this Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances). Moreover, the fact that Mason argued that trial counsel was ineffective for not challenging the trial court's jury instructions did not present the substantive claim to the Alabama Court of Criminal Appeals.

Third, Mason's next argument – that the trial court's jury instruction was incorrect because it did

not instruct the jury that it had to find aggravators beyond a reasonable doubt – is raised for the first time in Mason's certiorari petition. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument. Another reason for denying certiorari on this argument is that Mason has not alleged a split in the circuits concerning this claim.

D. Mason's Claim That Reasonable Jurists Could Debate Whether The District Court Erred In Denying Him Relief On His Ineffective Assistance Of Counsel Claims Is Without Merit.

Mason contends that he proved in the district court that his attorneys were ineffective. Mason asserts that reasonable jurists, therefore, could debate whether the district court erred in denying him relief on this claim. This Court should deny certiorari review of this claim because Mason has yet to show that the holding of the Alabama Court of Criminal Appeals is contrary to, or an unreasonable application of, this Court's holding in *Strickland v. Washington*, 466 U.S. 668 (1984). 28 U.S.C. §2254(d)(1)-(2). After considering Mason's claim, the district court agreed with this argument by the State and held that "Mason has not shown that the state court's review of these claims is an unreasonable application of either prong of the *Strickland* standard or an unreasonable determination of the facts in light of the evidence before it." Pet. App. 248a-250a.

E. The District Court Properly Denied Mason's Request For An Evidentiary Hearing.

Mason contends that he was entitled to an evidentiary hearing in district court on several of his ineffective assistance of counsel claims. Mason asserts that he made a reasonable attempt to develop the factual record in state court.

The ineffective assistance of counsel claims Mason requests an evidentiary hearing on are procedurally defaulted because Mason did not timely appeal the denial of his state post-conviction petition to the Alabama Court of Criminal Appeals. Pet. App. 236a-238a. It is well established that an evidentiary hearing should not be held on the merits of a procedurally defaulted claim. The Eleventh Circuit stated the following concerning an evidentiary hearing on procedurally defaulted claims:

> A state habeas petitioner is not entitled to an evidentiary hearing in federal court on the merits of a procedurally defaulted claim unless he can first overcome the procedural bar. This requires showing either cause for failing to develop in state court proceedings the facts supporting his claim, and prejudice resulting from that failure, *Keeney v. Tamayo-Reyes,* 504 U.S. 1, 11-12, 112 S.Ct. 1715, 1721, 118 L.Ed.2d 318 (1992); *Weeks v. Jones,* 26 F.3d 1030, 1043 (11th Cir.1994), *cert. denied,* 513 U.S. 1193, 115 S.Ct. 1258, 131 L.Ed.2d 137 (1995), or a "fundamental miscarriage of justice would result from failure to hold a federal evidentiary hearing." *Tamayo-Reyes,* 504 U.S. at 11-12, 112 S.Ct. at 1721. A

> petitioner is not entitled to a hearing on the threshold issues of cause and prejudice or manifest injustice without first proffering specific facts which support a finding that one of these exceptions to the procedural default rule exists. *See Smith v. Wainwright,* 741 F.2d 1248, 1261 (11th Cir.1984), *cert. denied,* 470 U.S. 1087, 105 S.Ct. 1853, 85 L.Ed.2d 150 (1985).

Hill v. Jones, 81 F.3d 1015, at 1023 (11th Cir. 1996). Mason has not attempted to prove cause and prejudice or a fundamental miscarriage of justice to overcome the procedural default of his ineffective assistance of counsel allegations. Certiorari should therefore be denied on this claim.

V. This Court Should Decline To Review Mason's Claim That Several Of His Claims Are Not Procedurally Defaulted.

Mason asserts that the district court's determination that several of his claims were procedurally defaulted merits this Court's review. Mason argues that reasonable jurists could debate whether his defaulted claims were effectively presented to the Alabama courts. He also argues that Rule 32.1(f), Ala.R.Crim.P., - providing for out-of-time appeals – has been inconsistently applied. Neither of those claims warrants review by this Court, for a number of reasons.

A. Certiorari Should Be Denied Because This Claim Was Not Raised In The Lower Courts.

Mason did not argue in the Eleventh Circuit that his defaulted claims were effectively presented to the

Alabama courts or that Rule 32.1(f), Ala.R.Crim.P., has been inconsistently applied. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule. For that reason alone, the writ should be denied as to this argument.

B. Mason's Claim Is Without Merit.

Mason's first argument that his *Batson* claim, his jury selection claims, his improper jury instructions claims, and his *Brady* claim were effectively presented on direct appeal is without merit. Mason did not raise these claims in the Alabama Court of Criminal Appeals or in the Alabama Supreme Court. It appears – although it is not clear from the certiorari petition – that Mason is arguing that these claims were presented because the record was searched for plain error or because the claims were referenced in his list of adverse rulings part of his brief. As set forth above, neither of these arguments is sufficient to prove that these claims are not procedurally defaulted. (See Arguments III and IV-A, above)

Mason next argues for the first time in his certiorari petition that his ineffective assistance of counsel claims are not procedurally defaulted because Rule 32.1(f), Ala.R.Crim.P., is not firmly established and regularly followed. Mason relies on the dissent in the Eleventh Circuit's opinion in *Maples v. Allen*, 586 F.3d 879 (11th Cir. 2009), to support his argument. However, Mason completely ignores the holding of the majority of the panel

which found that "Alabama's 42-day and out-of-time appeal rules were firmly established and regularly followed by the Alabama courts." *Maples*, 586 F.3d at 888. Mason's State-specific, fact-intensive argument is not worthy of this Court's review for two primary reasons: (1) an opinion regarding the adequacy of Alabama's 42-day deadline is not nationally important and (2) Mason's firmly established and regularly followed argument is incorrect. A combination of two rules prevented Mason from appealing the dismissal of his state post-conviction petition after August 18, 2005, and would prevent him from doing so today: Alabama Rules of Appellate Procedure 4(a)(1), which sets the 42-day deadline for filing a notice of appeal, and 2(a), which mandates dismissal for filing outside the 42-day window.[5] Both rules were "firmly established" in 2005 because each took effect on December 1, 1975, and have been published in the Alabama Code ever since. *See* Ala. Code, Vol. 23, Rules of Appellate Procedure 2(a), 4(a) (1975).

The rules were also "regularly followed" in 2005, as shown by numerous published decisions recognizing the dismissal of untimely appeals before 2005. *See, e.g.*, *Hayden v. Harris*, 437 So. 2d 1283 (Ala. 1983) (citing five cases for the proposition that "[w]e have consistently held that the failure of an appellant to comply with the rules that requiring [sic] notice of appeal be filed within 42 days from the date of entry of final judgment deprives the Court of

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[5] Mason cabins his firmly established and regularly followed analysis to Alabama Rule of Criminal Procedure 32.1(f). This rule, however, merely provides the *vehicle* for criminal defendants/petitioners to request an out-of-time appeal; that is, a second post-conviction petition filed in the circuit court.

appellate jurisdiction"); *Woods v. State*, 371 So. 2d 944 (Ala. 1979) (dismissing an untimely criminal appeal); *Davis v. State*, 644 So. 2d 44 (Ala. Crim. App. 1994) (same); *Martinez v. State,* 602 So. 2d 504 (Ala. Crim. App. 1992) (same); *Shephard v. State,* 598 So. 2d 39 (Ala. Crim. App. 1992) (same); *Turner v. State*, 365 So. 2d 335 (Ala. Crim. App. 1978) (same).

The purpose of the firmly established and regularly followed requirement is to prevent States from "invoking new procedural rules without adequate notice to litigants who, in asserting their federal rights, have in good faith complied with existing state procedural law." *Beard v. Kindler*, 130 S.Ct. 612, at 619 (Kennedy J., concurring). That purpose was met here. Mason's attorneys had notice of the 42-day deadline and the consequence for failing to meet it because, as previously stated, Appellate Rules 2(a) and 4(a) had been published in the Alabama Code since 1975.

That Alabama courts have discretion to grant an out-of-time appeal does not strip Alabama's 42-day filing deadline of its firmly established and regularly followed status. *Beard v. Kindler*, *supra*, at 618 ("We hold that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. . . . [A] discretionary rule can be 'firmly established' and 'regularly followed'—even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others"). Nor does the fact that the state courts have exercised that discretion render the rule inadequate. *See id.*; *Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989) (concluding that Florida's procedural rule barring post-conviction claims that were not raised

on direct appeal was "consistently and regularly" applied because "in the vast majority of cases ... the Florida supreme court has faithfully applied its rule" and the exceptions cited by the petitioner were not "sufficient to undercut the adequacy of the Florida procedural rule").

Mason relies on this Court's grant of certiorari in *Walker v. Martin*, to argue that this Court should also grant his certiorari petition. On February 23, 2011, this Court found that California's timeliness requirement qualifies as an independent state ground adequate to bar habeas corpus relief in federal court. *Walker v. Martin*, 562 U.S. ___, 131 S.Ct. 1120 (2011). Mason's argument that this Court should grant his cert petition based on *Walker* is without merit. As set forth above, Alabama's rules concerning filing a notice of appeal are firmly established and regularly followed and Mason had notice of these rules.

Mason also argues that he cannot be held accountable because his attorneys failed to timely file his notice of appeal and relies on this Court's opinion in *Holland v. Florida*, 130 S.Ct. 2549 (2010), to support this argument. This Court should not grant certiorari on this argument because it is raised for the first time in Mason's certiorari petition. This Court will not consider questions that were not properly presented to or ruled on by the lower courts except in extraordinary circumstances. *See Taylor v. Freeland & Kronz*, 503 U.S. 638, 645-646 (1992). This case presents no reason to deviate from that rule.

CONCLUSION

For the reasons set forth above, this Court should deny Mason's petition for writ of certiorari.

Respectfully submitted,

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